

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-107
DAVID A. RINGER)	File No. BPH-911230MA
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
SHELLEE F. DAVIS)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC

For Construction Permit
For New FM Radio Station at
Westerville, Ohio

To: Administrative Law Judge
Walter C. Miller

**PETITION TO ENLARGE ISSUES
AGAINST SHELLEE F. DAVIS**

WILBURN INDUSTRIES, INC.

Eric S. Kravetz
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Its Attorneys

August 23, 1993

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SUMMARY

The facts revealed in the course of discovery in this proceeding conclusively demonstrate that a financial issue must be specified against Davis, to determine whether her financial certification was based on no more than an "accommodation letter" provided by a banker who is a personal acquaintance and who hopes to secure business from her in the future. The letter was issued by the bank without any discussion of her business plan, the value of the property to be acquired with the loan, or the bank's credit criteria. Moreover, the plans and existing personal resources revealed in the course of discovery show that Davis could not reasonably expect to satisfy the bank's collateral requirements and has not agreed to meet such requirements. Finally, the information obtained in the course of her deposition and evident on the face of the documents she supplied also raises a serious and substantial question whether Davis understood that the bank letter she obtained was essentially meaningless and therefore falsely certified her financial qualifications.

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PETITION TO ENLARGE ISSUES

Wilburn Industries, Inc., by its attorneys, hereby submits its Petition to Enlarge Issues in this proceeding against Shellee F. Davis ("Davis"). As will be shown below, issues must be specified to determine whether Davis is financially qualified and whether her certification of her financial qualifications was knowingly false. In support thereof, the following is stated:¹

¹ The instant Petition is being submitted within 15 days after a transcript of Davis's deposition testimony and other documents relied upon were obtained by undersigned counsel. It therefore is timely-filed pursuant to Section 1.229(b)(3) of the Commission's Rules.

The Facts Ascertained Through Discovery

The facts revealed in the course of discovery in this proceeding conclusively demonstrate that a financial issue must be specified against Davis, to determine whether her financial certification was based on no more than an "accommodation letter" provided by a banker who is a personal acquaintance and who hopes to secure business from her in the future. The information obtained in the course of her deposition and evident on the face of the documents she supplied also raises a serious and substantial question whether Davis understood that the bank letter she obtained was essentially meaningless.

Specifically, in late December, 1991, Davis decided that, in order to construct and operate her proposed station for three months, she would require a bank loan of \$250,000.² She therefore contacted two local banks, BancOhio National Bank ("BancOhio") and Huntington National Bank ("Huntington Bank"), requesting a letter which would provide her with reasonable assurance of a loan commitment from that institution. (Attachment B, Tr. 40-41.)³ In each instance, she sent via facsimile: (1) a letter requesting "a letter of commitment for a potential loan", (2) a personal financial statement, and (3) a

² See Section III of Davis's application for construction permit, attached as Attachment A hereto.

³ Pertinent portions of the transcript of the Davis deposition are attached hereto as Attachment B.

sample bank letter provided to her by communications counsel. (Attachments B, Tr. 45, 48, 60; C-E.)⁴ She provided no budget or business plan, never discussed the projected profitability of her proposed venture or the monetary value of the proposed station, never learned of the banks' credit criteria, and never discussed either the terms of a projected loan or the collateral which might be required in connection with such a loan (Attachment B, Tr. 50-51, 54-56, 206.)

BancOhio is the bank which holds the account for Davis's current business, Britt Business Systems, Inc. (Attachment B, Tr. 47.) In response to her letter (accompanied by her financial statement and sample letter), Paul Casey, Manager of the bank advised her that he could not provide her with the letter she requested without evaluating such request "based on all of BancOhio's loan criteria". (Attachment F.)⁵ He assured her, however, that he would be interested in working with her by "applying BancOhio's loan underwriting standards during each step of the FCC approval process". (Id.) Davis, however, did not pursue the matter with BancOhio.

⁴ Attachment C hereto consists of the cover letters sent to the two banks; Attachment D is the personal financial statement which was sent; Attachment E is the sample bank letter provided to each banker.

⁵ Casey's letter to Davis is attached hereto as Attachment F.

Rather, Davis chose to rely on a letter she received from Ralph Frasier, a Vice President of Huntington Bank, who is a personal acquaintance and who had "been wanting my business for a long time" and "been after me for, you know, bringing the Britt account over to Huntington". (Attachment B, Tr. 44, 200.)⁶ Filling in blanks where specific numbers were called for, Frasier essentially copied the language concerning the loan which had been set forth in her counsel's model letter. (See Attachments E and G.)⁷ In particular, Frasier recited that: "Collateral for the loan will be the physical and intangible assets of the station, and may include your secured personal commitment." (Attachment G.)

Prior to reciting the terms of the possible loan (which terms, as noted above, had not previously been discussed with Davis), Frasier also added language of his own, stating that his letter was based on "our understanding concerning the value of the project," but that any loan would be conditioned upon whether "appropriate management and staff are acquired to run the station". (Id.)

⁶ As noted above, Britt Business Systems, Inc., has its account at BancOhio. Although Davis maintains a money market account at Huntington Bank, that is not her main personal account. (Attachment B, Tr. 46-47.)

⁷ Frasier's letter is attached as Attachment G hereto.

When questioned about this letter, Davis testified that she never discussed a business plan or the bank's credit criteria with Frasier. (Attachment B, Tr. 50-51, 54-56, 206.) When questioned in particular about the bank's collateral requirements, she also acknowledged that she intends to lease her studios, offices and transmission facilities from Mid-Ohio Communications, Inc. (Attachments B, Tr. 36-37; H.)⁸ She therefore planned to have few, if any, physical assets to pledge as security for the projected \$250,000 loan. She also could not identify any "intangible assets" which the station will have other than, perhaps, accounts receivable. (Attachment B, Tr. 57.)⁹ Finally, although Huntington Bank may require her secured personal commitment as collateral for the loan, Davis stated that, "I guess if the bank said I had to do it [pledge her personal property to secure the loan], then I would have to make a decision whether I was going to do it or not". (Attachment B, Tr. 59.) That is, she has not agreed to satisfy that condition if required to do so by the bank.

⁸ Attachment H consists of the letter from Mid-Ohio Communications, Inc., confirming the terms of her contemplated lease.

⁹ Davis cannot recall ever discussing with Frasier what such "intangible assets" might be, but stated that, "I guess I would assume" that the term may encompass the station's accounts receivable. (Id.). Even if the term was intended to mean what Davis now speculates, it is obvious that a station unable to meet its periodic bank payments would not have accounts receivable sufficient to satisfy the entire loan.

With regard to the language added by Frasier, Davis testified that she never discussed the projected value of the station with Frasier and understands that he was merely referring to the value of the station's service to the community. (Attachment B, Tr. 49.) Other than mentioning that she planned to manage the station, she also never discussed her staffing plans with Frasier. (Attachment B, Tr. 52.)

In March, 1992, Davis decided that she might require more money than she initially had anticipated, and so asked Frasier to issue her a second letter, for \$350,000, which he did. (See Attachment I.)¹⁰ This letter, dated March 9, 1992, was an exact copy of the earlier letter, except for a loan amount which was increased by \$100,000. Once again, there was no discussion of a budget or business plan, no exchange of information as to the projected value or income of the station, and no inquiry or explanation of the bank's loan criteria: Davis merely asked Frasier for a letter specifying additional funds and he supplied such letter. (Attachment B, Tr. 73, 76-79.) Thus, at this point and even if Davis eventually agrees to personally guarantee such a loan, the amount of the loan would exceed the total combined net worth of Davis and her husband as stated on the financial statement which she had provided to Frasier. (See Attachment D.)

¹⁰ Attachment I is a copy of Frasier's second letter.

Argument

It is by now well-established that an "accommodation letter" from a bank (i.e., a letter issued as a favor or in an effort to attract business, without meaningful discussion of the borrower's business plans and the bank's credit criteria) will not satisfy the Commission's requirement that an applicant have reasonable assurance of the financing it requires. Shawn Phalen, 5 FCC Rcd 53 (Rev. Bd. 1990). That is, it is not sufficient that a letter recite appropriate language; there must be substance behind the words. Id. This basic common-sense principle, which is neither subtle nor complex, has been explained as follows:

[I]n order...to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (e.g., collateral guarantees); that a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (e.g., payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, that adequate collateral has been demonstrated and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990)
(citations omitted).

In this case, it is patent that the letter which Davis obtained from Huntington Bank fails to meet this fundamental test. As an initial matter, Davis did not obtain a letter from BancOhio, the bank which has an established relationship with her and which indicated that it would be willing to issue the required letter once it received the data necessary to make an informed judgment on the matter. Rather, she turned to an acquaintance at Huntington Bank, who she knew had long been interested in obtaining the account of her current business as well as any future business endeavor she might pursue. He then issued a letter, based on a model provided to him by Davis, with no examination of the factors, such as a business plan, which a bank ordinarily must consider before making a loan to a prospective borrower.¹¹ Indeed, Davis made no effort even to ascertain what the bank's credit criteria might be. She also made no effort to supply the bank with the necessary information, such as her staffing plans, after that criterion was identified by the bank in its letter. Where the bank identified other factors, referring to the use of the station's "intangible

¹¹ The Commission therefore has recognized that the provision of a personal financial statement, standing alone, is insufficient. Isis Broadcast Group, 7 FCC Rcd 5125, 5129 (Rev. Bd. 1992). A bank also must be familiar with a business plan before it can evaluate the applicant's ability to repay the loan. Id.

assets" as security, she did not know what such assets might be and made no effort to find out.

Furthermore, an examination of the pertinent facts establishes that the letter provided to Davis by Frasier was issued without regard to Davis's actual plans or financial situation. Following the model provided to him, Frasier thus stated that the putative loan would be secured by the station's physical assets, but Davis would not possess such assets because she intends to lease the real estate and equipment to be used by her proposed station. Similarly, Frasier's letters recited that Davis might be required to pledge her own assets as security, but the only real estate of significant value already is heavily mortgaged, while her entire net worth (together with that of her husband) does not equal the value of the loan specified in Frasier's second letter.

Finally, even if (arguendo) the bank letter were valid, Davis has not agreed to provide the collateral which the bank may require to secure the contemplated loan. In these circumstances, where a bank may require the principal in an application to personally guarantee repayment of a loan and such individual has not agreed to accept such condition, the Commission has held that the bank letter itself does not provide reasonable assurance of financing. Vernon Broadcasting Co., 12 FCC 2d 946, 13 RR2d 245, 249 (1968).

In sum, and for a plethora of reasons, the deposition testimony and documents provided by Davis establish that a financial qualifications issue must be specified against Davis. The bank letter she obtained and is relying upon is no more than an accommodation letter which fails to satisfy the Commission's clear and reasonable requirements.

Moreover, Davis is an experienced businesswoman who certainly understands that a bank cannot reasonably decide whether or not a prospective borrower is creditworthy absent some indication of that borrower's business plan and the value of the enterprise for which the loan is required. She also must have recognized that she did not plan to possess the tangible business assets contemplated as security for the suggested loan and that her net worth would not suffice to secure such loan (assuming, arguendo, she agreed to provide such security). Indeed, the fact that she dropped her efforts to obtain a loan from her regular bank when the bank indicated a need for additional information and instead relied upon a letter from another bank which had long been eager to get her existing business account, indicates that she knowingly sought to obtain nothing more than an accommodation letter. While not necessarily critical to the question of her knowledge and intent, it also must be recognized that she was advised throughout this process by experienced communications counsel, so that it also appears that she was well aware of

Commission policy and precedent in this regard. Accordingly, a false financial certification issue, as well as a financial qualifications issue, must be specified in order to further explore the matter.

Accordingly, in view of the above, the following issues must be specified with regard to Shellee F. Davis, to determine:

- (1) Whether Davis has reasonable assurance of financing and is financially qualified to construct and operate her proposed station;
- (2) Whether Davis falsely certified her financial qualifications in her application; and
- (3) Whether, in light of the evidence adduced pursuant to the above issues, whether Davis is qualified to become a Commission licensee.

Discovery

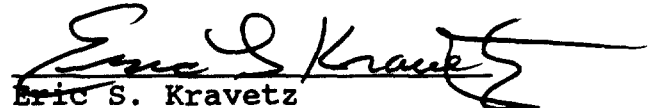
In the event that a financial issue is specified against Davis, Wilburn Industries, Inc. will take the further deposition of Shellee F. Davis. Wilburn also will depose Ralph K. Frasier, Vice President of Huntington Bank, and Paul Casey, Manager of BancOhio, each pursuant to a subpoena duces tecum which will

require that he appear and produce documents in his possession which pertain to the request for a letter by Davis and the provision of such letter by the bank.

Respectfully submitted

WILBURN INDUSTRIES, INC.

By:



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Brown, Nietert & Kaufman
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
(202) 887-0600

Its Attorneys

Dated: August 23, 1993

SECTION III - FINANCIAL QUALIFICATIONS

3

Attachment A

NOTE: If this application is for a change in an operating facility do not fill out this section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

☒ Yes ☐ No

2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$ 289,496.00

3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Shellee F. Davis 5518 Moccasin Drive Westerville, Ohio 43081	(614)899-0350	Applicant	\$50,000.00
Huntington National Bank 41 South High Street Columbus, Ohio 43215	(614)476-8300	Bank	\$250,000.00

COPY

1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of:

DAVID A. RINGER

ASF BROADCASTING CORPORATION

WILBURN INDUSTRIES, INC.

WESTERVILLE BROADCASTING
COMPANY LIMITED PARTNERSHIP

OHIO RADIO ASSOCIATES, INC.

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: File No. BPH-911231MB
:
: File No. BPH-911231MC
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X

Washington, D.C.

Wednesday, July 14, 1993

Deposition of:

SHELLEE F. DAVIS,

applicant, was called for examination by counsel for the
applicant Westerville Broadcasting Company Limited
Partnership, pursuant to Notice and agreement of the parties
as to time and date, beginning at approximately 10:10
o'clock, a.m., in the law offices of Dan J. Alpert, Esquire,
1250 Connecticut Avenue, Northwest, Washington, D.C. 20036,
before Catherine S. Boyd, a Notary Public in and for the
District of Columbia, when were present on behalf of the



CAROL J. THOMAS STENOGRAPHY
REPORTING SERVICES, INC.
3102 MARKET COURT
FAIRFAX, VIRGINIA 22030
(703) 273-8221

1 Q. When, when was that decision made?

2 A. Well, as far as definitely using the BBY site?

3 Q. That's correct.

4 A. It would have been when I got the letter from WBB
5 on the 23rd saying that you could use it, 23rd of December
6 1991.

7 Q. Well, let's talk about that letter.

8 A. Okay.

9 Q. How did you--how did that letter come into being?
10 Did you contact someone, somebody at WBBY, or did somebody
11 contact them on your behalf?

12 A. I contacted Carl Fry's office because Carl Fry, I
13 don't know how--maybe from Dan and Gary or from something
14 written, you know, that Mid-Ohio owned the site and the
15 equipment and so forth, and Carl B. Fry was the attorney for
16 it, so I called Carl B. Fry.

17 I was actually put in touch with his secretary,
18 which is L.T. Riggs. I had to fax her a statement saying
19 that I want this information regarding BBY, so I faxed it to
20 her.

21 Then they got their letter together and faxed it
22 to me and then mailed it to me, and then a day later, they

1 mailed another letter with an addendum of additional
2 equipment.

3 MR. MCCORMICK: Okay. Can we go off the record
4 for a minute?

5 (A discussion was held off the record.)

6 BY MR. MCCORMICK:

7 Q. You mentioned that you sent to Mr. Fry or Mr.
8 Fry's office a letter making the request for the WBBY
9 facilities.

10 Was that typewritten?

11 A. Yes. Yes.

12 Q. Do you still have a copy of that?

13 A. Yes.

14 Q. Do you have it here with you in Washington?

15 A. No.

16 MR. MCCORMICK: I'm going to ask your counsel that
17 it be produced.

18 MR. ALPERT: I see no problem with that. It was
19 inadvertently omitted. I had no idea it even existed until
20 this time.

21 MR. MCCORMICK: I understand.

22 BY MR. MCCORMICK:

1 Q. Are there any other, to your knowledge, any other
2 municipalities located between Columbus and Westerville such
3 as Worthington?

4 A. No. Worthington is on the side I think.

5 Q. To the best of your knowledge, Westerville is
6 immediately adjacent to Columbus?

7 A. Maybe on one side of it. They all--

8 Q. Did you ever examine whether it was? Did you
9 ever--

10 A. I have looked at a, and--yeah, I have looked at
11 maps. I think one side of it like maybe Columbus and
12 Westerville and Worthington and--

13 Q. Okay. Do you still have that map?

14 A. Yeah. General maps, yes; I have maps, yes.

15 Q. Can you provide that map to your counsel, please?

16 A. Sure.

17 Q. All right. I will be requesting it.

18 Q. So what else--we've talked about your contacting
19 Carl Fry and getting two letters from him.

20 Tell me what else you did in that to prepare for
21 filing an application.

22 A. Contacting a bank to get a Letter of Intent or a

1 loan.

2 Q. Okay. What bank did you contact?

3 A. Huntington National Bank.

4 Q. Did you contact more than one bank?

5 A. Bank Ohio.

6 Q. Which did you contact first?

7 A. Huntington National Bank.

8 Q. Did you obtain any sort of letter from Bank Ohio
9 of any sort?

10 A. Yes.

11 Q. Okay. Do you still have that letter?

12 A. I may.

13 Q. Can you summarize what that letter said?

14 A. It said something of we will need additional
15 paperwork in order to decide whether we are interested in
16 extending the intent letter.

17 Q. Did you provide them additional paperwork?

18 A. No.

19 Q. Did you ever visit Bank Ohio?

20 A. Bank Ohio is one of my banks.

21 Q. Okay. Let me be more precise. Did you ever visit
22 anyone or talk with anyone at Bank Ohio regarding the

1 Q. In what context? How did you know him?

2 A. Well, he has been wanting my business for a long
3 time. He is an acquaintance. I know of him.

4 Q. Okay. Mr. Frasier is identified in the letterhead
5 of Huntington Bank as Executive Vice President, General
6 Counsel, and Secretary?

7 A. Um-hum.

8 Q. Is Mr. Frasier's office in the bank?

9 A. Yes.

10 Q. Does he practice law in addition to working in the
11 bank?

12 A. No.

13 Q. At least to the best of your knowledge.

14 A. To the best of my knowledge, yeah.

15 Q. Now did you first contact Mr. Frasier--let's be
16 more precise.

17 Your first contact with Mr. Frasier about this
18 radio station was on the telephone, is that correct?

19 A. Yes.

20 Q. Would that have been before or after Christmas?

21 A. Before.

22 Q. And then what did you do with regard to obtaining

1 a bank letter?

2 A. Oh, I wrote him a letter. I prepared my financial
3 statement for him, and I faxed it all to him.

4 Q. Okay. Do you have the letter that you wrote to
5 him?

6 A. Yes.

7 MR. ALPERT: Counsel, am I missing--do I have that
8 letter?

9 MR. ALPERT: I'm not sure I even knew about this
10 letter before.

11 BY MR. MCCORMICK:

12 Q. Okay. I would ask--you still have it?

13 A. Um-hum.

14 Q. Would you--that was yes?

15 A. Yes. I'm sorry.

16 Q. Would you please make it available to your
17 counsel?

18 A. Yes.

19 MR. ALPERT: I have no problems with that.

20 BY MR. MCCORMICK:

21 Q. Now your financial statement is dated Christmas
22 Eve, December 24th?

- 1 A. Right.
- 2 Q. Did you actually prepare it on that day?
- 3 A. Yes.
- 4 Q. Okay. And how did it get to the bank? I believe
5 you said you faxed it?
- 6 A. I faxed it, right.
- 7 Q. Prior to Christmas 1991, had you had any personal
8 meeting with Mr. Frasier regarding the proposed loan?
- 9 A. No.
- 10 Q. Did you have any accounts for your business or
11 personally with Huntington?
- 12 A. Yes.
- 13 Q. Okay. Which was it? Was it a business account?
14 A personal?
- 15 A. Personal.
- 16 Q. A personal; was it your main personal account?
- 17 A. Um-um. No.
- 18 Q. What type of account was it?
- 19 A. Money market.
- 20 Q. Okay. Does Britt Business Systems have an account
21 with Huntington?
- 22 A. No.

1 Q. How about with Bank Ohio?

2 A. Yes.

3 Q. Okay. Now besides the letter--let me back up.

4 The letter that you sent to Mr. Frasier--

5 A. Um-hum.

6 Q. Did that precede the financial statement?

7 A. It was the 23rd.

8 Q. It was the 23rd. And did, in response to the
9 letter, did you have any communication from Huntington?

10 In other words, did Mr. Frasier or someone else at
11 the bank call you and ask for additional information?

12 A. No.

13 Q. Okay. The next step, though, was you on your own
14 initiative sent the financial statement to Mr. Frasier?

15 A. No. He said he needed the financial statement.

16 Q. He said that when? In your first conversation?

17 A. When I talked to him, yeah, he said it is just
18 that I didn't have it ready, so I had to prepare it.

19 Q. Do you regularly prepare financial statements? In
20 other words, some people will--let me back up.

21 Some people prepare financial statements once a
22 year, once a quarter.

1 A. No--only when I need to.

2 Q. Okay. And you prepared this financial statement
3 that was produced in discovery specifically in response to
4 Mr. Frasier's request?

5 A. Specifically for Mr. Frasier and Mid-Ohio.

6 Q. Did you provide it to--oh, for Mid-Ohio. I'm
7 sorry. That's the--

8 A. I had two reasons to--

9 Q. That's the entity controlled WBBY?

10 A. Right.

11 Q. Other than the letter and the financing statement,
12 financial statement, did you provide any other documents to
13 Mr. Frasier or anyone else from Huntington National Bank
14 prior to the issuance of the December 27th, 1991 letter?

15 A. Financial statement, letter, no. That was it.

16 MR. MCCORMICK: Counsel, can I ask you to place a
17 copy of the letter before Ms. Davis, the December 27th, 1991
18 letter?

19 MR. ALPERT: Sure.

20 MR. MCCORMICK: We can take a break.

21 (A recess was taken.)

22 MR. MCCORMICK: Back on the record.